

IN THE MATTER OF	:	BEFORE THE
CARRIT, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 08-004V

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### **DECISION AND ORDER**

On April 14, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Carrit, LLC for variances to reduce the 150-foot structure and use setback from a residential zoning district to (1) either 89 or 50 feet for a building, either 36 or 30 feet for the use, and zero feet for a 30-foot ingress/egress easement<sup>1</sup> in an M-2 (Manufacturing: Heavy) Zoning District, filed pursuant to Section 123.D.2.c of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Richard Talkin, Esquire, represented the property owner. Timothy Madden testified in support of the petition. Gloria Clark and Ed Lastnar testified in opposition to the petition.

### **FINDINGS OF FACT**

Based upon the evidence presented at the hearing, I find as follows:

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<sup>1</sup> This description of the 50-foot building and 30-use requested variances is taken from the petition and public notice form. As discussed below, the Conditional Use Plan depicts lesser encroachments. This decision and order adopts the Technical Staff Report's decision to evaluate the requested variances under the lesser encroachments depicted on the Conditional Use Plan.

1. The subject property is situated on the south side of Athol Avenue, northeast of Santa Barbara Court and is also known as 6835 Athol Avenue (the "Property"). The Property is located in the 1<sup>st</sup> Election District and is identified as Tax Map 38, Block 19, Parcel 516.

2. The 2.39-acre, generally rectangular Property is about 500 deep and has a variable width ranging between 160-180 feet, with the widest area in the northerly section. The Property is subject to a 150-foot setback from the northeasterly adjoining residentially zoned properties. Section 123.D.2.c. Owing to the Property's narrow width, all but a very small portion of the Property lies within this setback.

3. The Property formerly adjoined an unused public right-of-way ("ROW") for Athol Avenue on its northerly lot line. This right of way was abandoned in the early 1990s, and a former property owner acquired it to enlarge the Property. Consequently, the Property is now effectively a pipestem lot with a 30-foot wide pipestem extending several hundred feet in a southwesterly manner to Santa Barbara Court. The County has a 30-foot ingress/egress easement over this pipestem to provide emergency access to the residential properties along Athol Avenue during floods.

4. The Property does not currently have paved vehicular access to Santa Barbara Court, although there is a rough stone driveway in the area of the easement. This driveway drops in elevation from Santa Barbara Court to the gate at the southwest end of Athol Avenue.

5. The original area of the Property is open lawn to the southeast of the gate and then becomes a wooded area that slopes down significantly to the southeast lot line. The Conditional Use Plan depicts wetlands in the southeastern section of the Property.

6. Vicinal Properties. The Property's northeast lot line partially delimits the boundary between the M-2 zoning district applied to the parcels adjoining the Property to its northwest,

west, south, and southeast and the R-12 (Residential: Single) zoning district applied to the parcels to the Property's northeast. The adjoining M-2 properties are part of the Route 100 Business Park. Parcel 857/G adjoining the Property's southwest lot line is improved with an approximately 40' x 220' (28,600 square feet) industrial building. Parcel 857/E-1 is improved with a larger warehouse. The R-12 zoned properties adjoining the Property (Harwood Park) are improved with single-family dwellings with access from Athol Avenue, which ends at the Property. The nearest dwelling, 6801 Athol Avenue is situated about 20 feet from the Property's northeast lot line and is about parallel with the proposed building's loading area. The Property's southeasterly lot line adjoins a railroad right-of-way.

7. Roads. Santa Barbara Court has two travel lanes and about 36 feet of paving within an existing 60-foot right of way. The posted speed limit is 25 miles per hour. The estimated sight distance from the proposed driveway entrance is more than 400 feet to the south and more than 500 feet to the northwest. The posted speed limit is 25 MPH.

8. The Property is served by public water and sewer.

9. The General Plan's 2000-2020 Policies Map designates the Property as "Residential Area and Redevelopment Corridor." Santa Barbara Court is depicted as a Local Road on the Plan's Transportation Map.

10. The Petitioner's Proposal

A. The Petitioner is requesting a variance from the 150-foot residential zoning district setback to construct a 15,000 square foot building with an 89-foot building setback. The building would be situated in that portion of the Property closest to Parcel 857/G, 21 feet from the common lot line. The Variance Plan depicts a loading area at the building's northerly side just off the driveway easement and a large parking island between this area and the adjoining residences.

The loading areas and island lie directly southwest of and about 86-90 feet from the dwelling at 6801 Athol Avenue.

B. The Petitioner is also seeking a 36-foot use setback instead of the required 150 feet for 27 parking spaces and a driveway running parallel to the building. The driveway would continue around the building and end in another parking area.

C. Finally, the Petitioner is requesting a zero-foot setback, instead of the required 150 feet, from Athol Avenue where it ends at the gate in order to replace the gravel driveway with an asphalt drive that would terminate at the Athol Avenue gate to provide access to the loading dock and the driveway/parking area between the building and the adjoining residential properties.

11. Alternate Setbacks. The Conditional Use Plan also depicts two "alternate" setbacks, an alternate 50-foot building setback and an alternate 30-foot use setback. Mr. Madden stipulated that the alternate setbacks reflect the potential or possibility for a larger building. Responding to comments in the Technical Staff Report ("TSR") about these setbacks, Mr. Madden stipulated that they would be eliminated and the use would follow the 89-foot building setback and 36-foot use setback if the 21-foot setback were reduced to five feet through a landscaping requirement waiver. In response to questioning, he stated that if the waiver requirement were granted, the building could be enlarged in size in this area or moved back closer to the adjoining property line. He testified that the Petitioner would provide a combination of additional privacy fencing, additional landscaping and a screening wall and additional landscaping in the island near the loading dock to better screen the use from adjoining residences.

12. He stated that the zero-foot setback was for the purpose of improving Athol Avenue access to the County easement (emergency access) beyond the existing gate separating the

property and the avenue. He also stated that the 21-foot setback from the adjoining the M-2 zoned Parcel 857/G is intended in part to meet the landscaping requirements for this lot line.

13. Mr. Madden stated that there is no purchaser or specific use proposed for the building. According to Mr. Madden, the Property owner is in the material handling business and if he occupied the building, it would be used as a warehouse or for fabricating conveyor-handling systems in manufacturing uses.

14. Petitioner's Exhibit 1 is a markup of Sections 123 (the M-2 zone) and 122 (the M-1 zone) of the Zoning Regulations. Several uses are marked with an "X." The Petitioner would not permit these uses. As Mr. Madden characterized these uses, they are the heavier, more industrial uses that are not conducive to being on the site due to access and the Property's size.

15. Mr. Madden testified that the Petitioner had not previously created the parcel through subdivision, but purchased it subject to the existing 150-foot setback. It had once been improved by a dwelling.

16. Mr. Madden also testified that the 89-foot building setback and the 36-foot use setbacks were the minimum necessary.

17. Ms. Clark, whose dwelling lies closest and downhill from the proposed building, testified that lifts and trucks backing up in the industrial park create a lot of noise, as do trash trucks. She stated her opposition to a variance for an as-yet undetermined use and was concerned about not knowing about who would visit or use the Property. She also stated the improved road would open up the area to more pedestrian traffic and that there was a shack on the Property when she moved to her house.

18. Ed Lastnar testified that his basement was twice flooded from water flowing from the gravel driveway. He also said there is a lot of noise from unloading coming from the industrial

park, the railroad, and airplanes. He was also concerned about the effect of an adjoining warehouse on his property values.

19. In response to questioning, Mr. Madden testified that the refuse area would probably be located in or near the loading area. In response to the concerns of Mr. Lastnar and Ms. Clark, Mr. Madden said the Property creates a hardship because a person looking at it as a potential location would not commit to in the absence of a variance. He also agreed that a building and the proposed landscaping would mitigate some noise and that the fence could be extended to bar pedestrian access.

### **CONCLUSIONS OF LAW**

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides that a variance may be granted only if all of the following determinations are made:

- (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.
- (2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.
- (3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.
- (4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance does not comply with Sections 130.B.2.a(1) through (4), and therefore must be denied.

1. The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

In this case, the Property is relatively small and narrow compared to area M-2 zoned properties. In addition, the Property slopes down significantly to the railroad right-of-way and its back section is encumbered by wetlands and wetlands buffers. The Petitioner, however, did not present evidence that the presence of wetlands is unique to the Property relative to other area M-2 zoned properties. I therefore conclude the Property's narrowness and topography cause the Petitioner practical difficulties in complying with the 150-foot setback from the adjoining residentially zoned district, in accordance with Section 130.B.2.a(1).

2. Section 130.B.2.a(2) requires me to determine that the granting of the variance will not alter the essential character of the neighborhood or district in which the Property is located, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare.

Importantly, the 150-residential setback as applied to the Property renders only a very small area developable without a variance. Consequently, a variance is required to permit the Petitioner to make reasonable use of the site. The Petitioner's agreement to exclude certain uses in response to the TSR's recommendation to deny the variance request notwithstanding, the speculative nature of the proposed use leads to the necessary determination that the Petitioner has failed its burden of proof regarding compliance with this criterion with respect to all three requested variances. As Mr. Madden testified, the building could be used as a warehouse, as flexspace, or as a manufacturing facility, albeit of a more limited intensity than may be found in an M-2 Zone. In my view, no reasonable inference can be drawn from this limited evidence to enable me to determine compliance with this criterion, especially considering that the proposed unknown use could be as close as 30 or 36 feet from adjoining residential properties, and about 56 feet from the dwelling at 6801 Athol Avenue.

3. The practical difficulty in complying strictly with the setback regulation arises from the size and shape of the lot and was not created by the Petitioner, in accordance with Section 130.B.2.a(3).

4. Section 130.B.2.a(4) requires me to determine if the variances are the minimum necessary to afford relief. I must necessarily conclude they are not. Under this standard, the requested variance must be the minimum that will make possible the reasonable use of land, building, or structures. Because the use of the Property is unknown, I cannot determine if the proposed use is a reasonable and significant use. Because the proposed use is unknown, I cannot further determine if the setbacks are the minimum necessary.



**ORDER**

Based upon the foregoing, it is this **5<sup>th</sup> day of May 2008**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Carrit, LLC, to reduce the 150-foot building and use setback to either 89 or 50 feet for a building and either 36 or 30 feet for the main portion of the site and a zero-foot use setback for a 30-foot ingress/egress easement in an M-2 Zoning District is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**

  
**Michele L. LeFaivre**

**Date Mailed:** 5/6/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.